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Traumatic Brain Injury and a Divergence between Moral and Criminal Responsibility

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Traumatic Brain Injury and a Divergence Between Moral and Criminal Responsibility

Paul Litton*

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I. INTRODUCTION

In 1974, two months after having a portion of his brain removed due to an accident at the sawmill where he worked, Cecil Clayton checked himself into a mental hospital, frightened by his suddenly uncontrollable temper.

Previously, Clayton had been an intelligent, guitar-playing family man, relatives said. He abstained from alcohol, worked part time as a pastor and paid weekly visits to a local nursing home.

* Associate Dean for Research and Faculty Development, R.B. Price Professor of Law, University of Missouri School of Law. I would like to thank Professor Jane Moriarty and the members of the Duquesne Law Review for inviting me to participate in such an excellent event, and many thanks to the Law Review's staff for helpful edits. I am also very grateful to Dr. Christopher Graver for an extremely illuminating and valuable conversation about the effects of traumatic brain injuries.
But after the accident, which necessitated the removal of 20 percent of his frontal lobe, everything changed.

“He broke up with his wife, began drinking alcohol and became impatient, unable to work and more prone to violent outbursts,” Clayton’s brother Marvin testified at trial.

In 1979, he visited William Clary, a doctor who examined him for extreme anxiety, depression and paranoia.

“I can’t get ahold of myself, I’m all tore up,” Clayton told the doctor, according to court filings from his attorneys.

Clayton’s spiraling mental state and increasingly violent behavior came to a head in 1996, when he shot and killed Christopher Castetter, a sheriff’s deputy responding to a domestic disturbance between Clayton and his girlfriend. Clayton was eventually convicted of murder, and executed via lethal injection in Bonne Terre, Mo.¹

Cecil Clayton’s story is reminiscent of Phineas Gage’s alleged saga, familiar to any student of neuroscience: A severe traumatic brain injury transformed him from a well-functioning member of society into an impulsive, anti-social person.² Clayton’s brain injury and its psychological effects were the basis for numerous legal claims throughout his capital litigation. He argued at trial that he could not form the required mens rea for first-degree murder, maintaining that he could not deliberate.³ He argued in the sentencing phase that his brain injury should be given great mitigating weight.⁴ On post-conviction, he claimed that trial counsel should have urged that he was incompetent to stand trial.⁵ In his federal habeas petition, he argued that counsel should have argued that he was insane at the time of the offense.⁶ Moreover, he argued⁷ he was

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³ State ex rel. Clayton v. Griffith, 457 S.W.3d 735, 738 (Mo. 2015).
⁴ Id.
⁵ Id.
⁶ Id. at 739.
⁷ Id.
TBI and Responsibility

ineligible for execution under *Atkins v. Virginia*, and otherwise was incompetent for execution under *Ford v. Wainwright*. The breadth of these claims relating to his injury, presented at different stages of litigation, is why one reporter wrote, “[Clayton’s] death brought an end to nearly two decades of litigation during which it seemed that Clayton’s brain, rather than the man himself, was on trial.”

Traumatic brain injury (TBI), particularly in severe cases, can have such extraordinary effects on one’s psychological capacities that it may be relevant to many kinds of legal claims in criminal proceedings. The focus of this essay is on claims related to an agent’s status as a responsible agent. In other words, this essay will discuss the relationship between traumatic brain injury and claims that an individual does not have the capacities required to be fairly held accountable for wrongful actions. The law may hold most adults fully responsible for their crimes, but it may not hold responsible young children and the insane. The insanity claim (which Clayton argued his trial attorneys should have raised) asserts that the defendant lacked the capacities required for the state to hold him responsible for his wrongdoing. Clayton’s attorney argued that it was unfair to hold him responsible, maintaining that the accident “left him blameless” for the murder he committed. In a statement released after his execution, she emphasized that “Mr. Clayton was not a ‘criminal’ before the sawmill accident,” arguing that he that accident “left him blameless” for the homicide he committed because “20 percent of his frontal lobe [was] removed.” Also, during the penalty phase, arguing that his injury was mitigating, Clayton’s counsel urged that his capacities required for full responsibility were diminished, and, therefore, he should not receive the harshest sentence that could be justified for a fully responsible individual.

In this contribution to a symposium on the important topic of traumatic brain injury and law, I focus on the following question: What is the relationship between traumatic brain injury and responsibility? How does, or how might, a traumatic brain injury affect one’s status as a responsible agent?

9. 477 U.S. 399 (1986) (holding that the Eighth Amendment bars execution of persons who are insane).
11. State ex rel. Clayton, supra note 3, at 737; Kaplan, supra note 1.
Clayton’s severe brain injury is relevant to his responsibility status, but why? What is the basis of his attorney’s claim? It can be interpreted in multiple ways: (1) his injured brain, not Clayton, is responsible for his crime; (2) though Clayton did commit the crime, he did not have free will given that his actions were caused by his brain injury, which was outside his control; (3) the injury caused cognitive impairments such that he could not act rationally; (4) the injury impaired his volitional capacities such that he had too much difficulty controlling his emotions and impulses; or (5) the injury caused such an extreme personality change that the person who existed after the injury was no longer Cecil Clayton.

One aim of this essay is to examine the plausibility of each interpretation of his attorney’s claim. In doing so, this essay will discuss the ways in which a traumatic brain injury may be relevant to assessing a person’s responsibility status. In this discussion, I will emphasize a point previously made: The fact that a brain injury caused an agent to commit a criminal or immoral act that he would not have otherwise committed is not, by itself, relevant to criminal responsibility. A corollary to that claim is that neuroscientific findings are irrelevant to responsibility insofar as they are offered to show that one’s brain caused his wrongful act. Traumatic brain injury may be relevant to criminal responsibility depending on the rationality impairments it causes. Rationality impairments, if serious enough, undermine or diminish criminal responsibility.

To examine the plausibility of each interpretation of his attorney’s claim, we need to answer another question: In claiming that Clayton was not responsible or blameworthy for his wrongdoing, was she relying on standards of moral responsibility or criminal responsibility? Of course, in asking that question, we need to know whether the standards for moral responsibility and criminal responsibility are the same or diverge in some way. Literature on criminal law often assumes that the criteria for legal responsibility mimic the criteria for moral responsibility.

However, reflection upon traumatic brain injury cases reveals at least some divergence between the criteria for moral responsibility and those for criminal responsibility. Accordingly, a second aim of this essay is to highlight this divergence. In short, there may be cases for which ordinary moral intuitions would permit an excuse from responsibility although the law does not, and should not, recognize. Those cases are ones in which a severe brain injury causes a significant personality change though it does not cause psychological impairments serious enough to qualify for insanity. The differ-
ence in significance between judgments of moral blame and criminal liability underscores this divergence in responsibility criteria. Cecil Clayton’s case may not be the best example to illustrate the divergence between moral and criminal responsibility criteria, but it demonstrates the possibility of such cases.

II. TRAUMATIC BRAIN INJURY AND CRIMINAL RESPONSIBILITY

Let us now examine the different interpretations of the claim by Clayton’s attorney that he was blameless, not a responsible agent when he committed murder.

A. It Was His Brain, Not Him

The first seemingly commonsense reason to find Clayton less than fully responsible is that his brain injury—not him—caused his terrible wrongdoing. After all, from all accounts of Clayton, there was no reason to believe he would commit homicide before the sawmill accident. Given that he was not responsible for the sawmill accident, so the argument goes, we should blame Clayton’s altered biology for his crime, not him.\(^\text{13}\)

The problem with this argument is that it assumes that conduct for which we can be held responsible is caused by an agent yet somehow not caused by her brain. That assumption is, of course, false. All of our conduct is caused by our brains. The fact that we can, at least in principle, causally explain conduct by reference to one’s brain structure and chemistry does not imply that we cannot also explain conduct from a different perspective, by reference to one’s decisions, choices, intentions, beliefs, and other psychological phenomena.\(^\text{14}\) I decided to write this paper because I believe I have multiple reasons to write it. Neural correlates surely underlie the facts of decision and the existence of my thoughts and beliefs, but the existence of those neural correlates does not imply that the explanatory account in terms of my psychology is illusory. One might disagree, maintaining that mental states are illusory;\(^\text{15}\) but on that view, it would be senseless to ask the question with which we began (i.e., should we attribute the conduct to the agent’s brain or to the


agent, where the latter implies actions based on choices, intentions, desires, etc.). If there are no mental states, then there is no sense in which any agent is responsible for a choice or act. There is no point in distinguishing the responsible from the non-responsible unless at least some agents are responsible for their conduct and attitudes.

B. His Brain Injury Causally Determined His Wrongdoing

One might argue, however, that even if Clayton’s conduct was caused by his mental states, he is not responsible if he could not have had different mental states. In other words, so the argument goes, even if he made a decision to act in wrongful ways, his decision was causally determined by facts outside his control; namely, the accident and the injury it caused to his brain. This argument is based on the intuition that responsibility requires free will, and free will requires the capacity to choose among genuine alternatives.

One might acknowledge that Clayton made choices but wonder, upon learning about the severity of his brain injuries, whether he really could have made different choices than the ones he did. The philosophical view underlying this argument is incompatibilism: that being causally determined by forces outside one’s control is incompatible with free will and/or fair ascriptions of responsibility.

The criminal law does not accept incompatibilism in that its criteria for responsibility do not include freedom from causal determination. Stephen Morse and Michael Moore have demonstrated\(^\text{16}\) that the criminal law is “officially compatibilist,”\(^\text{17}\) meaning persons can meet the criminal law’s criteria for responsibility even if forces outside our control causally determine all our actions and choices. In other words, whether Clayton’s brain injury, accident, or other forces outside his control causally determined his wrongdoing is irrelevant to assessing his responsibility status under law.

To understand the compatibility of criminal responsibility and causal determination, let us briefly turn to insanity standards. Insanity standards represent the criminal law’s conception of what it means to be an agent who may fairly be held responsible for wrongdoing. Of the forty-six states that have the defense, most have a


purely cognitive test, focusing on the beliefs of the defendant.\textsuperscript{18} The 
\textit{M’Naghten} test, which is most widely used in one form or another, 
directs a jury to acquit if, at the time of the crime, “the party ac-
cused was laboring under such a defect of reason, from disease of 
the mind, as not to know the nature and quality of the act he was 
doing, or as not to know that what he was doing was wrong.”\textsuperscript{19} The 
first prong of the Model Penal Code rule, adopted in other states, 
also represents a cognitive standard: an accused is not responsible 
for a crime if, due to a mental disease or defect, he lacked “substan-
tial capacity . . . to appreciate” the wrongfulness of his conduct.\textsuperscript{20} In 
essence, given that the law provides rules and considerations to 
guide our conduct, it presumes there are persons who have the ca-
pacity to consider the law when reasoning about what to do.\textsuperscript{21} A 
person who does not know or sufficiently appreciate the nature of 
his conduct or know the legally or morally relevant features of his 
circumstances lacks sufficient rational capacity to be considered a 
legally responsible agent.

Notice that possessing knowledge, appreciating right versus 
wrong, and being able to reason practically about what one is doing 
are perfectly compatible with being caused to act by events outside 
one’s control. To see that fact, let us stipulate the truth of causal 
determinism, which is, “roughly speaking, the idea that every 
event[, including each human choice and action,] is necessitated by 
antecedent events and conditions together with the laws of na-
ture.”\textsuperscript{22} Even if my sitting here typing was causally determined by 
forces outside my control—including my genes, my upbringing, all 
laws of physics, etc.—I still understand the nature of what I am 
doing. Even if all our choices and actions are caused by such forces 
outside our control, the overwhelming majority of adult persons 
possess the capacity to know what they are doing, to appreciate 
right versus wrong, and to reason practically about what to do. The 
law does not excuse for being \textit{caused}; it excuses for severe psycho-
logical impairments that undermine rationality. Accordingly, if

\textsuperscript{18} The insanity standards of approximately seventeen states include a volitional prong. 
\textsuperscript{19} \textit{M’Naghten’s Case}, 10 Cl. & F. 200, 208 (1843), 8 Eng. Rep. 718, 722 (1843).
\textsuperscript{20} \textit{MODEL PENAL CODE} § 4.01(1) (AM. LAW INST., Proposed Official Draft 1962). The 
actual language of the standard would excuse a defendant for failing to appreciate the crim-
inality or wrongfulness of his conduct, depending on which term the adopting state legisla-
ture chose to put into the standard.
\textsuperscript{21} Stephen J. Morse, \textit{Immaturity and Irresponsibility}, 88 J. CRIM. L. & CRIMINOLOGY 
15, 18 (1997); Morse, \textit{supra} note 16, at 339.
\textsuperscript{22} Carl Hoefer, \textit{Causal Determinism}, STAN. ENCYCLOPEDIA OF PHIL. (2016), 
Clayton or other sufferers of severe TBI are less than fully responsible agents, it is not because their brain injury, per se, causes their conduct. Rationality impairments caused by brain injuries, if sufficiently severe, undermine or diminish one's status as a responsible agent.

The criminal law in some American jurisdictions also permits an insanity defense for individuals who suffered a severe volitional impairment at the time of their crime. That is, in these jurisdictions, the law excuses individuals who might have known the nature and wrongness of their actions but who lacked sufficient capacity to control themselves. New Mexico, for example, states that “if, by reason of disease of the mind, [a] defendant has been deprived of or lost the power of his will which would enable him to prevent himself from doing the act, then he cannot be found guilty.” 23 A person suffering from kleptomania might argue that though she knew she was wrongfully committing theft, she could not resist the urge to steal.

Non-responsibility under a volitional insanity test requires more than showing that one’s conduct was caused by one’s brain injury. Let us stipulate that Clayton’s brain injury was a cause of his failure to resist his impulse to kill his victim. That stipulated fact, by itself, would not be sufficient to conclude Clayton was not a responsible agent at the time of his crime. The fact that an agent’s brain injury caused one’s failure to control himself does not show, by itself, that the agent lacked sufficient capacity to control himself. Under existing law, to determine whether an agent could have controlled himself—whether he could have done otherwise—a factfinder should ask whether the agent would have done otherwise if certain facts had been true. 24 That is, the factfinder must contemplate counterfactual circumstances that are closely similar but importantly different from the actual circumstances in which the agent acted. 25 The “policeman at the elbow” test is illustrative. A factfinder might ask if the person with kleptomania would have still stolen the shirt in similar circumstances with one crucial fact different: A police officer stood nearby. 26 If the defendant would

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have still stolen the shirt despite high chance of arrest, a factfinder might conclude that he lacked sufficient capacity to resist his pathological urge to steal.

Take note that in assessing whether a defendant had sufficient volitional capacity for responsibility, we do not ask whether he could have done otherwise in exactly the same circumstances. If every single fact from his brain structure and chemistry to his external situation were exactly the same, there is no reason to think he would have taken any different course of action. In asking whether the defendant would have done otherwise under different circumstances, we are trying to assess his capacity to react to the recognition of reasons. Whether a defendant has that capacity to react to the recognition of reasons—to conform his will to his judgment about what he has reason to do—is independent of whether he was caused to act by forces outside his control. Once again, we see that a legal standard that helps define the criminal law's conception of responsibility does not support the idea that an agent is less than fully responsible if his wrongdoing was caused by forces outside his control. If Clayton or other victims of a severe TBI are less than fully responsible for a wrongful act, it must be for impairments to their cognitive and volitional capacities, the topics to which we now turn.

C. His Brain Injury Diminished His Capacity for Rationality

As evident by previous discussion, we now have encountered our first legally sound interpretation of Clayton’s attorney's claim, regardless of whether it was persuasive on the facts of his case. That interpretation is that Clayton’s brain injury impaired his psychological functioning in ways that diminished his capacity for rationality and, thus, his status as a responsible agent. “Although the language for each insanity standard offers the potential for mental defect as the result of some neurologically based injury, research suggests the majority of individuals who pursue an insanity defense, or who are acquitted using this defense, have a major mental illness such as schizophrenia, another psychosis, or a major affective disorder.” Although in some very rare cases the cognitive impairments from TBI can rise to the level of insanity, the effects are

1991) (“While we concede the ‘policeman-at-the-elbow’ test is not recognized as a valid test for insanity in Ohio . . . it is directly probative of defendant’s ability to refrain.”).
more often relevant to a judgment of diminished responsibility, which is relevant in mitigation at sentencing.\textsuperscript{28}

Indeed, Clayton’s defense urged arguments along these lines. His experts testified not merely that Clayton failed to deliberate before committing murder, but that he was “not capable of ‘coolly reflecting . . . when agitated.’”\textsuperscript{29} They further testified that his inculpatory statements were not trustworthy because Clayton was “unusually ‘susceptible to suggestion,’”\textsuperscript{30} implying that his perception of reality was distorted. According to medical examinations from the late 1970s and early 1980s, Clayton “hallucinated strangers and heard voices and noises such as drawers opening and closing.”\textsuperscript{31} He experienced “severe anxiety around people”\textsuperscript{32} and “developed paranoid delusions.”\textsuperscript{33}

Clayton’s counsel made related arguments, not to show his lack of responsibility for his crime, but to show that he was incompetent to proceed and for execution. One expert asserted Clayton “lack[ed] the capacity . . . to make rational decisions regarding his habeas proceedings”;\textsuperscript{34} another testified that Clayton was delusional as to whether he committed the crime and whether the state would execute him. Again, regardless of whether these cognitive impairments were sufficiently severe to diminish his status as a responsible agent, it is these kinds of deficits that are relevant to responsibility, not the fact that his accident and brain injury caused them.

Beyond Clayton’s case, a TBI can cause cognitive impairments that can diminish or eliminate one’s status as a responsible agent, depending on the severity and location of the injury. Injuries to the frontal lobe can impair “the ability to focus attention to appropriate stimuli, organize and plan, problem-solve, formulate good decisions, and exhibit appropriate judgment.”\textsuperscript{35} It can also diminish one’s

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\item ACAM, PSYCHIATRY & LAW 161 (1997) and HENRY J. STEAMAN ET AL., BEFORE AND AFTER HINCKLEY: EVALUATING INSANITY DEFENSE REFORM (1993)).
\item 28. \textit{Id.} at 228-29.
\item 29. \textit{State ex rel.} Clayton v. Griffith, 457 S.W.3d 735, 738 (Mo. 2015).
\item 30. \textit{Id.}
\item 32. \textit{Id.} at 288 (citing Report of George Klinkerfuss, M.D., Jan. 30, 1978 (on file with O’Brien)).
\item 33. \textit{Id.} at 289 (citing Report of William F. Clary, M.D., Jan. 24, 1979 (on file with O’Brien)).
\item 34. \textit{Clayton}, 457 S.W.3d at 746.
\end{itemize}
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“ability to empathize with others,”\textsuperscript{36} which can impact one’s ability to distinguish right from wrong. Damage to temporal lobes can diminish one’s capacity to form and store new memories,\textsuperscript{37} which also has implications for an agent’s understanding of the nature of his conduct and his circumstances. Psychosis (which involves “some loss of contact with reality”\textsuperscript{38}) and anxiety are also “well-known sequelae of TBI.”\textsuperscript{39} Again, these sorts of cognitive impairments are relevant to assessing an agent’s responsibility status.

Cognitive impairments caused by TBI may be severe enough such that we might conclude the agent should not be held responsible for wrongdoing or other socially inappropriate behavior. One documented effect of some TBIs is behavioral disinhibition.\textsuperscript{40} Disinhibition might involve impulsivity, which perhaps is more relevant to volitional impairments; however, it can also involve an inability to recognize social inappropriateness. Some victims of a TBI behave sexually at inappropriate times or occasions, such as masturbating in public without realizing it violates social norms, not to mention legal rules.\textsuperscript{41} Such an offender would be non-responsible for failing to understand the wrongness of his behavior.

William Winslade provides another example of an individual whose TBI, suffered during a near-fatal car accident, caused the kinds of cognitive deficits that undermine responsibility. After the accident, he became increasingly suspicious and delusional. He formed an overwhelming paranoid delusion that his mother, with whom he had previously had a good relationship, had become part of a conspiracy to kill his father. One day he was at the drugstore with his mother when she was picking up some cardiac medication (coumadin) for his father. The pharmacist said to her jokingly, “What are you going to do with all this rat poison?” The young

\begin{footnotesize}
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\item \textsuperscript{36} Id.
\item \textsuperscript{39} Wood & Agharkar, supra note 37, at 415 (citing Edward Kim et al., \textit{Neuropsychiatric Complications of Traumatic Brain Injury: A Critical Review of the Literature}, 19 J. NEUROPSYCHIATRY & CLINICAL NEUROSCIENCES 2, 114 (2007)).
\item \textsuperscript{40} Marcelo Schwarzbold et al., \textit{Psychiatric Disorders and Traumatic Brain Injury}, 4 NEUROPSYCHIATRIC DISEASE & TREATMENT 797, 809 (2008).
\end{itemize}
\end{footnotesize}
man's paranoid delusion about the conspiracy intensified and he felt compelled to kill his mother to protect his father. When he and his mother got home, he shot her to death. The psychiatrists who evaluated the young man all agreed, as did the attorneys, that he was insane because they thought he was a paranoid schizophrenic. Although it was clear that he was legally insane, after he was committed to a mental institution, it was discovered he was not suffering from schizophrenia. Only later did his physicians realize that his traumatic brain injury rather than schizophrenia caused his paranoia.  

The impairments caused by this individual’s injury were sufficient to undermine completely his status as a responsible agent, according to his psychiatrists. However, in another individual case, cognitive impairments could be serious but not quite as severe such that the agent should be considered partially responsible. Cognitive impairments that diminish but do not completely undermine responsibility are relevant to sentencing and other criminal law doctrines. Indeed, although TBI-related cognitive impairments can rise to the level of insanity in the very rare case, the effects are more often relevant to a judgment of diminished responsibility, relevant in mitigation at sentencing. With a less serious injury, the impairments might not diminish the agent’s status at all. The critical point is that these kinds of psychological impairments are relevant to responsibility because they can undermine an agent’s capacity for practical rationality.

D. His Brain Injury Caused a Severe Volitional Impairment

Traumatic brain injury, particularly to the frontal lobes, can have severely negative consequences for an individual’s ability to control impulses. Clayton’s brother testified that Clayton, after losing

43. As Stephen Morse points out, American criminal law does not include a generic partial responsibility doctrine. However, one could interpret voluntary manslaughter doctrine as providing a partial responsibility doctrine that reduces “a homicide that would otherwise be murder to manslaughter.” Stephen J. Morse, Diminished Rationality, Diminished Responsibility, 1 OHIO ST. J. CRIM. L. 289, 289 (2003). The Model Penal Code’s take on voluntary manslaughter, employing the “extreme mental or emotional disturbance” standard, seems to represent clearly a partial excuse based on psychological impairment.
44. Yates & Denney, supra note 27, at 228-29.
45. Wood & Agharkar, supra note 37, at 417 (citing Harold V. Hall, Criminal-Forensic Neuropsychology of Disorders of Executive Functions, in DISORDERS OF EXECUTIVE FUNCTIONS: CIVIL AND CRIMINAL LAW APPLICATIONS 63 (Harold V. Hall & Robert J. Sbordone eds., 1999)).
20% of his frontal lobe, "became impatient, unable to work, and more prone to violent outbursts."46 In insanity cases and capital sentencing trials, mental health experts regularly testify that frontal lobe damage suffered by the defendant led to impulse control difficulties and disinhibition.47

Whether insanity standards should include a volitional prong is controversial, as evidenced by the fact that a minority of states permit an insanity acquittal based on an impulse control problem.48 There is good reason to conclude that insanity standards should only include a cognitive prong.49 Furthermore, if Clayton’s attorney’s assertion that he was blameless was based on the premise that he lacked volitional capacity, the claim is probably doubtful. Thirty minutes after he killed Deputy Castetter, two officers appeared at Clayton’s home to question him. He asked his friend whether he should shoot them; after his friend said, “No,” Clayton did not.50

Nonetheless, regardless of Clayton’s case or whether insanity standards should include a volitional prong, volitional control impairments should be considered mitigating at sentencing. Responsibility status comes in degrees. Even if a minimal capacity for self-control should be the threshold for criminal liability, one’s responsibility status may be diminished due to volitional or cognitive impairments relative to agents without such psychological dysfunction. Thus, the main point here is that we have a second plausible interpretation of Clayton’s attorney’s claim: His frontal lobe damage diminished his capacity to control impulses, and despite his awareness of the nature of his conduct, his capacity to control his impulses was too diminished to hold him responsible. We can disagree with her conclusion that Clayton was not fully responsible yet

46. State ex rel. Clayton v. Griffith, 457 S.W.3d 735, 737 (Mo. 2015).
47. See, e.g., Hoskins v. State, 75 So. 3d 250, 254 (Fla. 2011) ("[T]hree experts testified that [defendant] had a frontal lobe impairment and that as a result [he] had difficulty controlling his impulses."); Crook v. State, 813 So. 3d 68, 70-71 (Fla. 2002) (neurologist links defendant’s impulse control disorder and frontal lobe damage); Hall v. Lance, 286 Ga. 365, 370-71 (2010) (neuropsychologist testifies that persons with frontal lobe dysfunction "are more often involved in crimes of impulse."); State v. Thompson, No. 02631, 2003 WL 22018899, at *5 (Tenn. Crim. App. 2003) (expert concluded damage to frontal lobe diminished defendant’s "ability to delay and inhibit impulsive reactions on the day of the alleged crime."). See also People v. Holland, 32 Misc. 3d 926, 928 (N.Y. Cty. Ct. 2011) (in sex offender classification case, government argues that brain injury caused registrant to have poor impulse control).
49. Stephen J. Morse, Against Control Tests for Criminal Responsibility, in CRIMINAL LAW CONVERSATIONS 449 (Paul H. Robinson, Stephen P. Garvey & Kimberly Kessler Ferzan eds., 2009); see also Stephen J. Morse, Uncontrollable Urges and Irrational People, 88 VA. L. REV. 1025 (2002); Litton, supra note 25, at 186.
50. Clayton, 457 S.W.3d at 737.
agree that he was less than fully responsible if his capacity to control his impulses was, in fact, seriously diminished by his traumatic brain injury.

III. MORAL RESPONSIBILITY AND PERSONALITY CHANGE

One interpretation remains of the claim that Clayton was blameless due to his TBI: The agent who committed the homicide was not the real Clayton. Due to his brain injury, his personality changed so drastically that the person post-injury was no longer Clayton. This interpretation is distinct from the first; it is not the claim that it was his brain or altered biology. Rather, the claim is that the agent who acted was not truly Clayton. The basis for the claim is the scientific research that shows many victims of TBI “develop significant changes in character traits.”

The law does not recognize significant personality change, by itself, as an excuse. A sentencing judge or juror may consider the extent to which she believes an offender’s crime reflected her true self, but no legal standard explicitly incorporates a correlating criterion of responsibility. In fact, empirical research suggests that our intuitions about moral responsibility respond to beliefs as to whether an action reflected an agent’s “true self.” Within our everyday moral experience of blaming ourselves and others for moral infractions, we do consider whether an act truly reflects attitudes and character traits attributable to the actor in question.

Let us begin by understanding the significance of moral blame, specifically with respect to judgments that an agent has wronged another person. Moral blame seems to have some social significance apart from an associated judgment that a person or group has violated an obligation owed to someone. In Susan Wolf’s words, to blame someone for moral wrongdoing is to judge the “moral quality of the individual herself . . . [in a] seemingly more serious way” than judging her for some other kind of failing.

T.M. Scanlon offers a persuasive account of blame’s significance. Blaming judgments respond to the perception that another

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52. See, e.g., George E. Newman, Julian De Freitas & Joshua Knobe, Beliefs About the True Self Explain Asymmetries Based on Moral Judgment, 39 COGNITIVE SCIENCE 96 (2015) (arguing that data show that we think “deep inside every individual is a ‘true self’ moving her to behave in morally virtuous ways, and this belief, in turn, ‘causes people to hold different intuitions about . . . whether . . . she deserves praise or blame’
has expressed ill will or inappropriate indifference toward the value of another person or persons.\textsuperscript{55} Moral blame, then, has a different kind of significance for interpersonal relations than other kinds of criticisms. If you fail to see the value of music or chess, and if I care deeply about them, then perhaps limitations exist on the kinds of relationship we might have; but even if we do not share common interests, many good relationships remain possible. We “can still be . . . good neighbor[s], co-worker[s], or even friend[s].”\textsuperscript{56} However, if I hold you responsible for conduct that exhibits disrespectful attitudes toward me as a person, then my blaming you has a deeper significance; the implications are more severe. If your attitudes toward me are completely disrespectful of my value as a person, then I should not see reason to have any kind of meaningful relationship with you. Scanlon’s insight about blame, more generally, is that to judge someone blameworthy is to claim that “something about [her] attitudes toward others . . . impairs the relations that others can have with [her].”\textsuperscript{57}

Thus, morality is concerned not merely with blameworthy and praiseworthy acts but also with the attitudes agents hold toward others. Specifically, it is concerned with attitudes that are sensitive to reasoned judgments. To illustrate, most of us do and should morally blame persons who view others with contempt based on sex, race, or other demographic categories. Even if you do not act on your contempt for me based on race, your attitudes are still blameworthy in that it is appropriate for me to take them as an impairment to our relations. Moreover, your attitudes that impair our relations are sensitive to reasoned judgment, unlike, say, your sexual orientation or height. It could be sensible for me to demand a justification in terms of reasons for your attitude or, in the alternative, an explanation or excuse.

We blame an agent for an action or attitude only when that action or attitude is “attributable to the agent.”\textsuperscript{58} An act or attitude is attributable to an agent not merely because it is causally attributable to his biology. An intention caused by another agent directly stimulating my brain or by hypnosis would not be mine, even if I experienced it. It would be inappropriate to demand that I justify the intention given that it did not spring from my own attitudes.

\begin{itemize}
\item \textsuperscript{55} Scanlon, Moral Dimensions, supra note 54 at 128 (relying on Peter Strawson, Freedom and Resentment, in xviii Proceedings of the British Academy 1-26 (1962), reprinted in Free Will 59-80 (Gary Watson ed., 1982)).
\item \textsuperscript{56} Scanlon, What We Owe, supra note 54 at 159.
\item \textsuperscript{57} Scanlon, Moral Dimensions, supra note 54, at 128.
\item \textsuperscript{58} Scanlon, What We Owe, supra note 54, at 277.
\end{itemize}
amenable to practical reasoning.\textsuperscript{59} As Scanlon argues, to be an agent whom we may hold responsible—to be a “rational creature”—

is a matter of having a coherent psychology of a certain kind: of there being the right kind of stable and coherent connections between what one says, does, and how things seem to one at one time, and what one says, does, and how things seem to one at later times. This coherence is not merely a matter of the judgments a creature makes, but also of what occurs to it and how things seem to it (what strikes is as relevant to a given question, for example). . . . What distinguishes cases like hypnosis and brain stimulation is thus not that they involve causal influences but rather the fact that these causal influences are of a kind that sever the connection between the action or attitude and the agent’s judgments and character.\textsuperscript{60}

Notice an implication of Scanlon’s observation. Imagine an evil scientist secretly manipulates my brain in a way that causes me to form the belief that I should insult my friend who happens to be standing nearby.\textsuperscript{61} This belief is already normative in that I experience the thought “I should insult my friend”; moreover, I do not reevaluate it. I form the intention and act on it. I did not suffer a hallucination or delusion about empirical reality: I understood the nature of my action. I retained the capacity to recognize that it was wrong. And let us stipulate that I could have refrained from insulting my friend in the sense that had I seen a reason to refrain, I would have. In other words, I was sane; I met the criminal law’s criteria for responsibility. Nevertheless, I have a moral excuse. The belief did not arise from my own stable judgment-sensitive attitudes. The scientist’s direct manipulation of my brain “sever[ed] the connection” between the intention on which I acted and my attitudes and character.\textsuperscript{62} Perhaps there was a moment during which I could have re-evaluated the belief; nevertheless, my friend does not have reason to believe that the insult reflects any blameworthy attitude of mine that should impair our relations. Her response might be, “That wasn’t you.”

So now we are in a position to see another way in which a traumatic brain injury might undermine moral responsibility. Let us start with Scanlon’s example:

\textsuperscript{59} Id.
\textsuperscript{60} Id. at 278.
\textsuperscript{61} This example is based on Scanlon’s discussions: Id. at 278-79; SCANLON, MORAL DIMENSIONS, supra note 54, at 129.
\textsuperscript{62} SCANLON, WHAT WE OWE, supra note 54 at 278.
Suppose... that someone who has previously always been kind and considerate suddenly begins making cruel and wounding remarks to her friends after being hit on the head or given drugs for some medical condition. We would not, at least at first, take this behavior as grounds for modifying our opinion of her. The injury or drugs constitute a break... block[ing] the attribution of these actions to the person we have always known.63

The brain injury, in his example, severed the connection between the way the agent normally sees the world and the way in which he is temporarily experiencing it. Put differently, in light of his stable characteristics, the agent normally does not see reason to make cruel remarks; however, he now, temporarily, experiences the sense that he has reason to make these remarks. He has an excuse because the fact that he sees reason to be cruel was not rooted in his judgment-sensitive attitudes or his character. Now, if the agent does not revert back—if his “old self” does not reappear—then at some point he no longer has the excuse. If his cruelty continues, then we would say that he has changed and owns these disrespectful actions and attitudes.64

Therefore, a significant personality change, at least for some finite period of time, can represent reason to excuse an agent for wrongdoing. Though controversial, much of the psychological literature on TBI suggests that some agents, depending on the injury, experience personality changes.65 The Phineas Gage story surely comes to mind, as “friends and acquaintances said he was ‘no longer Gage’ after his accident.66 Even if the changes to Gage’s personality are the substance of myth,67 “marked personality changes and

63. Id. at 278-79.
64. Id.
deviant social behavior in premorbidly normal individuals have frequently been noted in cases following damage to the prefrontal region."^{68}

Researchers have documented several kinds of personality changes in victims of a TBI. One prevalent diagnosis is apathy, sometimes but not always associated with depressive symptoms.\(^{69}\) On one definition of "apathy," it entails a "lack of motivation, that is, loss of motivation that is not attributable to emotional distress, intellectual impairment, or diminished consciousness."\(^{70}\) It seems, based on common sense, that apathy can lead to moral failures. A person suffering from apathy might ignore or fail to recognize the fact that a friend is in need. Lacking motivation to listen intently to others, she may fail to react properly to someone’s pain or to show a family member or friend appropriate concern in a time of need. Now imagine someone who suffers from apathy due to a TBI although she was, before the accident, very attentive to the needs of others. If we were unaware of her TBI, we might blame her for negligence toward her friends and family; certainly, they would see her negligence as impairing their relations. However, upon learning of her brain injury, we likely will see her personality change as excusing, at least for a certain period. We might say, "She is really not herself. This is not her. The friend who I know really cares." I emphasize here that this excuse is plausible even if the agent understands the nature of her actions—she is in touch with reality in that she might know she is ignoring the needs of others—and is not suffering from a volitional incapacity or loss of self-control.

Other studies show that some TBI victims show an increase in aggressive behavior and irritability.\(^{71}\) Aggressive behavior, of course, can represent moral failure in itself. It can involve verbal or physical threats or abuse. Irritability can lead to moral transgressions. It can cause adults to mistreat children and spouses; it can cause rude and impatient behavior toward other persons. Again, aggressiveness and irritability might represent a change in personality and, thus, on that basis, be excused at least for a limited duration.


\(^{71}\) Schwarzbold et al., supra note 69, at 808.
One might reasonably point out here that TBI-related aggressive behavior and negative conduct caused by irritability is most often impulsive, not premeditated. Insofar as the behavior is excusable, one might argue, the basis of the excuse is a volitional impairment, not personality change. In other words, one might argue that instances of TBI-related aggression or irritable behavior might be excusable, but the reason is that such victims of TBI lose the ability to control themselves, especially when they suffered injury to their prefrontal cortex. Personality change might not represent an independent basis of excuse. It seems clear that it is very difficult, at the least, to distinguish a personality change from volitional, as well as from cognitive, impairments. Cases in the literature regarding personality changes from brain injuries do also seem to involve cognitive impairments and diminished capacities for self-control. Indeed, a neuropsychologist would not look for a personality change in a patient except for personality changes that affect psychological functioning.72

Nevertheless, it is a mistake not to see severe personality change as a distinct basis for moral excuse. Recall the individual stricken with serious apathy following a brain injury. Acting contrary to her pre-injury self, she might fail to react empathetically to a friend’s pain or her appropriate concern in a time of need. Her ignoring her friend does not have to involve a failure to resist any impulse. She might also understand very well that her lack of attention to her friend displays a lack of caring. An excuse from moral blame seems appropriate, especially if she recovers from her injury and reverts to her old caring self. There may even be cases in which an agent did, in fact, fail to control an impulse but nevertheless should be excused from moral blame if her wrongdoing does not reflect long-standing, stable, judgement-sensitive attitudes. Perhaps the agent’s TBI did diminish her ability to control her negative impulses; that fact does not imply that the individual lacks sufficient volitional capacity to be held responsible to some degree. Perhaps her volitional impairment, by itself, justifies a finding of partial responsibility. But if her conduct was due to a temporary and extreme personality change such that her wrongdoing is not attributable to her pre-injury and post-recovery attitudes, then a full excuse may be warranted.

72. Interview with Christopher J. Graver, Ph.D., Chief, Neuropsychology Service, Madigan Army Medical Center (Aug. 17, 2017).
This reflection on TBI-related personality changes reveals a slight divergence between criteria of moral responsibility and explicit requirements of criminal responsibility. Certainly, a criminal defendant may argue at sentencing that a criminal act did not really represent his true self, that a brain injury caused a personality change from which he can recover. But while a defendant may present that argument at sentencing, a significant personality change cannot undermine criminal responsibility altogether independent of any severe cognitive or volitional impairment.

Acknowledging the divergence between the criteria for moral and criminal responsibility does not imply that the law should change. The law cannot recognize such a full excuse based on personality change. Some of the reasons are associated with why some character-based theories of the excuses are not persuasive. It is just not feasible to assess an individual’s character traits held and expressed throughout his life and discern the extent to which the act in question reflects such traits. Specifically, with respect to TBI cases, we would run into such difficulties in trying to discern the extent to which some instance of wrongdoing is due to a personality change. For one, individual resilience to the effects of a TBI varies from person to person. Imagine two persons who suffer the same TBI, and their TBIs are responsible for weakening their ability to resist impulses to the same extent. However, imagine one of them, pre-injury, had greater strength of will, and was able to resist antisocial impulses even after the injury. If the second agent, who pre-injury was more weak-willed but nevertheless conformed to the law, succumbed to antisocial impulses post-injury, would it be appropriate to conclude that his crime was due to a personality change? It is just impossible to answer.

This obstacle is particularly salient in the TBI context. Some of the factors that put someone at risk of suffering a TBI mirror some characteristic effects of suffering one. That is, while we have seen that TBI can cause cognitive impairments and other symptoms associated with mental illness, low cognition and psychiatric illness are also causes of suffering a TBI. At the same time, persons tend to underestimate their cognitive impairments and deficits pre-injury. In other words, a person might have had some cognitive impairment before injury of which she was unaware and which actually contributed to the suffering of the injury; however, she then

may realize post-injury that she does have a particular impairment, but she will incorrectly attribute it to the TBI. These empirical findings regarding victims of TBI make it especially difficult to discern whether some wrongful act was caused by a personality change, which was, in turn, caused by the injury.

Second, the sort of acts punishable under the law are generally more serious in terms of harm caused. We must demand very high levels of self-control of persons when it comes to the kinds of conduct prohibited by the criminal law. In fact, in my view, the fact that the law must demand very high levels of self-control is the main reason why the law should not recognize volitional impairment as a basis for a successful insanity plea. It is also why the law cannot recognize any full excuse based on personality change or the fact that a wrongful act does not reflect an agent’s longstanding attitudes or “true self.” The law cannot provide individuals with an incentive to commit a “one off” wrongful act. With respect to any defense that would completely exempt an individual from criminal responsibility, the law should maintain its focus on cognitive and rationality impairments.

IV. CONCLUSION

Traumatic brain injury can render an individual blameless under criterion for moral and criminal responsibility. It is important, however, to understand how a traumatic brain injury may be relevant to an individual’s responsibility status. The fact that an individual would not have committed a crime but for a brain injury is not sufficient to undermine or even diminish her status as a fully accountable agent. What matters are the psychological effects of the TBI: Did it cause cognitive impairments undermining or diminishing the individual’s capacity for practical reasoning? Did it cause a volitional impairment, meaning he could not control himself and act in accordance with his judgment? While cognitive and volitional capacities are explicitly articulated in law as criteria of responsibility, reflection on TBI cases highlights a criterion of moral responsibility not explicitly provided in the criminal law: Did the TBI cause such a severe personality change in the offender that it is appropriate to excuse him because his conduct did not truly reflect his attitudes toward others?